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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIA HERRERA,

Defendant and Appellant.

B286348

(Los Angeles County
Super. Ct. No. GA097651)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stanley Blumenfeld, Jr., Judge. Affirmed and Remanded.

Sunnie L. Daniels, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Maria Herrera of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),¹ and found not true the allegation that she inflicted great bodily injury (§ 12022.7, subd. (a)). She admitted having suffered a prior conviction: a 2011 gang-enhanced (§ 186.22) conviction for drawing or exhibiting a firearm in the presence of a motorist driving on a public street (§ 417.3). She admitted that the conviction qualified as a strike (§§ 667, subd. (d), 1170.12, subd. (b)), a serious felony (§ 667, subd. (a)) and a prior prison term (§ 667.5, subd. (b)). The trial court denied defendant's motion to strike her prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)), and sentenced her to a term of 11 years in state prison: the middle term of three years for the conviction of assault with a deadly weapon, doubled to six years based on the prior strike conviction, plus a consecutive five year enhancement for the prior serious felony. The court "stayed" the prior prison term enhancement.

On appeal, defendant contends that the trial court erred in denying her *Romero* motion, and that the case must be remanded for the court to exercise its discretion whether to strike the enhancement for her prior serious felony conviction under section 667, subdivision (a). We conclude that the court did not abuse its discretion in denying the *Romero* motion, but that the case must be remanded for the court to consider whether to strike the section 667, subdivision (a) prior. Also, on remand, the court must either impose or strike the section 667.5, subdivision (b) enhancement; the enhancement cannot be stayed.

¹ All section references are to the Penal Code unless otherwise indicated.

BACKGROUND

Prosecution

In October 2015, defendant lived with her girlfriend, Melissa Cabrera, in an apartment in a building on Garfield Avenue in Pasadena. Late one night, Cabrera knocked on the door of another apartment in the building, a one-bedroom unit occupied by five men. One of the men, Carmelo Chavez (Carmelo) went to the door. Cabrera appeared intoxicated and lost. Carmelo asked her what had happened. She said she did not know and then threw up. Carmelo let her in and told her to vomit in the bathroom. Later, she fell asleep there, and Carmelo carried her to an empty bed. The next day at 7:00 a.m., Carmelo unsuccessfully tried to awaken Cabrera, and then left for work. When he returned home, Cabrera was gone.

Cabrera later reported to the police that the men in the apartment had raped her. Defendant came to the apartment and threatened that the men were “going to be fucked up.” After investigation, all charges were dismissed.

On November 6, 2015, at about 11:00 a.m., another of the men who lived in the apartment, Cesar Hernandez (Cesar), was walking to the apartment building when defendant and Cabrera rushed him. Appellant took out a box knife. Cesar backed into a pole, tripped, and fell on his back. Appellant got on top of him and swung her knife at him. She cut the tendons in two fingers of Cesar’s right hand.

A neighbor, Rafael Ramos, heard screaming, looked out his window, and saw Cesar holding his hand, which was dripping blood. Defendant ran off.

Cesar's injury required surgery and stitches. His finger tips lost sensation, and he could no longer work as a cook.

Defense

Cabrera testified that before appearing at the men's apartment, she drank three or four alcoholic beverages. The next thing she remembered was waking up in the morning in a dark bedroom where two men slept in bunk beds near her. She believed she was raped because she felt pain in her genital area and her underwear was off her left leg and rolled up to her right knee. A chair blocked the door to the bedroom, and a third man was lying down outside of the bedroom. He stared at Cabrera. She recognized him because he had honked at her, whistled, and followed her around in the neighborhood.

Cabrera did not tell defendant about the incident until after November 2, 2015, when she reported the incident to the police, whom she found unhelpful. Cabrera sought restraining orders against the men, but the judge denied her requests. Cabrera testified that she, not defendant, cut Cesar's hand because she was mad that he "came on to" her.

DISCUSSION

I. Romero Motion

Defendant contends that the trial court abused its discretion in denying her *Romero* motion to strike her prior strike conviction. We disagree.

At the sentencing hearing, before hearing argument, the court stated that its tentative ruling was to deny the motion. The court explained that it considered “all of the factors,” and listed the salient ones. First, the court found that the strike was not remote. The strike offense occurred in 2010, with a conviction in June 2011, a little more than four years before the instant offense (November 2015). Defendant was sentenced to two years in state prison for the prior strike, and after release was convicted of two additional misdemeanors before commission of the instant offense.²

Second, the court found that defendant’s strike offense was not part of a single period of aberrant behavior. The court noted that from 2007 through the commission of the instant offense in 2015, defendant committed nine crimes of escalating severity, leading to the prior strike and the present case.³

Third, the court had examined the record of the prior strike offense and found that the crime was a gang-related assault on the

² Those offenses were possession of burglary tools (§ 466) and false information to a peace officer (§ 148.9). See also footnote 3, *infra*.

³ In February 2008, defendant was convicted of three misdemeanor offenses: possession of a controlled substance (Health & Saf. Code, § 11377), grand theft auto (§ 487) and possession of burglary tools (§ 466). In July 2008, she was convicted of misdemeanor false identification to a peace officer (§ 148.9). In 2010, she was convicted of two additional misdemeanors -- petty theft (§ 484, subd. (a)) and use of a controlled substance (Health & Saf. Code, § 11550) -- and committed the strike offense for which she was convicted in 2011. After her release, she was convicted in 2014 of misdemeanor possession of burglary tools (§ 466) and in 2015 of misdemeanor false identification to a peace officer (§ 148.9). In November 2015, she committed the instant offense.

victim in which defendant instigated the use of a firearm (no shots were fired). Fourth, the court observed that the present offense involved violence and significant injury (though the jury did not find the great bodily injury allegation true). The court concluded: “For all those reasons, I don’t see how I could in good conscience conclude that . . . your client . . . falls outside the spirit of the three strikes law such that I could strike that strike.”

Following the court’s tentative ruling, defense counsel argued that appellant had had a “difficult life,” in a poor family living in a gang neighborhood. He stated that a lengthy sentence would be a hardship because appellant’s mother was in “failing health” and her father was recently hospitalized because of a serious blood infection. Further, counsel argued that appellant “has every chance to rehabilitate.”

The court responded that it was “not unsympathetic to the impact of a three-strike sentence” on appellant, and “not unsympathetic to some of the concerns genuinely held that animated these actions. But for the reasons that I said when I tried to go through the sentencing factors and analyze this as . . . required . . . , I don’t see how I get to striking the strike other than by expressing through that action sympathy which, as I said, I have a certain level of sympathy with regard to what genuinely was believed to have animated this. So for all of those reasons, I don’t believe that it would be appropriate for the court to reach what I think would be an unprincipled conclusion that she falls outside the three strikes law. So respectfully that motion is denied.”

The record discloses a thoughtful analysis of relevant considerations consistent with the law governing *Romero* motions. A trial court's discretion to strike a prior strike conviction is strictly circumscribed. "Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citing *People v. Williams* (1998) 17 Cal.4th 148, 161.] [¶] Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so." (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.)

The court cannot strike a strike ""guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant," while ignoring "defendant's background," "the nature of his present offenses," and other "individualized considerations."" (*Williams, supra*, 17 Cal.4th at p. 159.) Indeed, a trial court can give

“no weight whatsoever . . . to factors extrinsic to the [Three Strikes] scheme.” (*Id.* at p. 161.) On the other hand, the court must accord “preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.” (*Ibid.*)

Here, the record supports the trial court’s findings that the strike offense was not remote, that it was not part of a single period of aberrant behavior, that it was a gang-related crime of violence, and that the present offense also involved violence, as well as significant injury. Given these factors, the trial court reasonably concluded that defendant did not fall outside the three strikes scheme in whole or in part.

Defendant’s primary contention is that that her motive for the instant crime (she lashed out, believing Cabrera had been raped but no prosecution would occur) was a strong mitigating factor suggesting that the crime was not likely to recur. According to defendant, however, the court did not adequately consider that factor, concluding instead that striking the strike based on sympathy for defendant’s motive would be unprincipled. We find no error. In substance, the court observed it was not unsympathetic to defendant’s sense of rage based on a sincerely-held belief that Cabrera had been raped. But the court reasoned that its sympathy could not displace the consideration of other factors which placed defendant within, and not outside of, the letter and spirit of the three strikes law. Defendant’s remaining contentions amount to nothing more than reweighing the factors considered by the court. But

that reweighing does not demonstrate an abuse of discretion in the courts' denial of the *Romero* motion.

II. *Section 667, Subdivision (a) Prior*

Effective January 1, 2019 (after appellant's sentencing), Senate Bill No. 1393 deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancements for defendant's prior serious felony conviction under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has such discretion. Defendant's case is not final on appeal, and therefore she is entitled to the ameliorative effect of the enactment.⁴ Further, as respondent concedes, remand is appropriate. In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24

⁴ "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired." (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.) The time to file a petition for certiorari expires 90 days after our opinion is filed—longer, if the defendant files a petition for review. (U.S. Supreme Ct. Rules, rule 13(1), (3).) That takes finality well into 2019.

Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) In the instant case, there is no clear indication that the trial court would not have exercised its discretion to strike the section 667, subdivision (a) prior. Therefore, the case must be remanded for the court to exercise such discretion.

We express no opinion on how the court should rule. We note only: (1) the court's decision must be "in strict compliance with section 1385(a)" (*Romero, supra*, 13 Cal.4th at p. 530), and (2) under the full resentencing rule, should the court decide to strike the section 667, subdivision (a) prior, it is entitled to reconsider its other prior sentencing choices (see *People v. Buycks, supra*, 5 Cal.5th at p. 893).

III. *Section 667.5, Subdivision (b) Prior*

In imposing a term of 11 years, the court purported to "stay" the one-year enhancement for the section 667.5, subdivision (b) prior. However, the failure to impose or strike a section 667.5, subdivision (b) prior is a legally unauthorized sentence. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391-392, 401.) Therefore, consistent with the trial court's intent, we order it stricken (though, as we have noted, should the trial court decide to strike the section 667, subdivision (a) prior, it is entitled to reconsider this and its other prior sentencing choices (see *People v. Buycks, supra*, 5 Cal.5th at p. 893).)

DISPOSITION

The judgment is affirmed. The case is remanded with directions to the trial court to decide whether it will exercise its discretion to strike the section 667, subdivision (a) enhancement. At the remand hearing, the defendant has the right to counsel and the right to be present. If the court elects to exercise this discretion, the defendant shall be resentenced and the abstract of judgment amended. If the court elects not to exercise this discretion, the abstract of judgment must be amended to reflect that the section 667.5, subdivision (b) prior is stricken.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.